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In The

Supreme Court of the United States

October Term, 1996

CITY OF ANAHEIM,

Petitioner,

REPRINTED COPY

vs.

CALIFORNIA CREDIT UNION LEAGUE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The opinion of the Ninth Circuit Court of Appeals is reported at 95 F.3d 30 and is attached to City of Anaheim's Petition as Appendix A. The United States District Court's order denying motion to dismiss and granting summary judgment is attached to the Petition as Appendix B; and the judgment is attached as Appendix C.

Credit Union National Association, Inc. submits this brief as amicus curiae in support of respondent, California Credit Union League.

STATUTORY PROVISIONS INVOLVED

The principal statutory provision involved in the case is 12 U.S.C. § 1768, a section of the Federal Credit Union Act, the applicable provision reading as follows:

> The federal credit unions organized hereunder, their property, their franchises, capital, reserves, surpluses, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such federal credit union shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed.

The statute is set forth in full as Petitioner's Appendix D.

STATEMENT OF INTEREST OF CREDIT UNION NATIONAL ASSOCIATION, INC.

Credit Union National Association, Inc. appears as amicus curiae with the written consent of both parties, given in letters which have been filed with the Clerk of this Court. Credit Union National Association, Inc. is a national trade association representing the interests of approximately 90 percent of the more than 12,500 federal and state chartered credit unions operating in the United States with approximately 67,000,000 consumer members.

Federal credit unions are non-profit cooperative associations of individuals organized under the Federal Credit Union Act "for the purpose of promoting thrift among [their] members and creating a source of credit for provident or productive purposes." 12 U.S.C. § 1752(1). Congress encouraged the success of the credit union movement in order to bring financial services to people who were unable to obtain such services elsewhere; and to foster the development of a system of financial cooperatives that would serve as a valuable alternative to the traditional for-profit banking system. In exchange for the tax exemption, credit unions accept limited markets, have limited investment and loan authority, have democratic control, rely extensively on the service of volunteer directors and are required to maintain adequate deposits in their federal deposit insurance fund.

Funds needed to pay real property and tangible personal property taxes come from reserve cushions maintained by the credit union. The imposition of additional taxation would require maintenance of additional reserves. This would necessarily reduce the earning that could be paid to credit union members on their deposits and would increase the interest rates that would need to be charged on loans to members. Credit unions would be compelled to seek only the most advantageous accounts, offer

only the most economical services and make investments that carry more risk in order to keep the reserve cushion adequate. This would, in essence, move the credit union system toward the traditional for-profit banking system, rather than providing an alternative to it. Currently, credit unions are allowed to promote thrift and provide the source of credit that Congress envisioned. The tax exemption is, at least in part, responsible for the movement's healthy financial condition, particularly in relation to profit-driven banks and savings and loan associations.

On behalf of the federal credit unions, Credit Union National Association, Inc. is concerned that this attempt to circumvent the long standing tax-exempt status of federal credit unions, established by federal authority, could open the doors to other meritless attacks on these non-profit institutions by state and local taxing authorities.

SUMMARY OF ARGUMENT

The Ninth Circuit decision correctly applies 12 U.S.C. § 1768 in finding that federal credit union employees, on credit union business, are constituent parts of the federal instrumentality, and are immune from all state and local taxation unless for real property or tangible personal property. The legal incidence of Petitioner's transient occupancy tax falls on the federal credit union itself when its employees stay at Petitioner's hotels on official federal credit union business. Therefore, imposition of the tax is impermissible as it is an attempt to circumvent the federal tax exemption of federal credit unions by imposing a local tax on a federal instrumentality. Furthermore, the decision is not in conflict with the Fourth Circuit court, and the decision clearly answers the questions raised in this case with regard to the exemption. Therefore, the Petition should be denied.

ARGUMENT

I.

THE NINTH CIRCUIT DECISION CORRECTLY APPLIES THE STATUTE AND RECOGNIZES THE INTENTION OF CONGRESS THAT FEDERAL INSTRUMENTALITY EMPLOYEES, WITH RESPECT TO THEIR PROFESSIONAL DUTIES, ARE ENTITLED TO TAX-EXEMPT STATUS.

The City requests that the Petition be granted because the Ninth Circuit decision is "contrary to the plain language of the Anaheim Municipal Code." The City fails to recognize that most importantly, the decision is consistent with the plain language of 12 U.S.C. § 1768:

> The federal credit unions organized hereunder, their property, their franchises, capital, reserves, surpluses, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such federal credit union shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. Federal Credit Union Act, Section 122, 12 U.S.C. 1768 (amended by 51 Stat. 4, Dec. 6, 1937).

Congress declared the nation's credit unions exempt from taxation in 1937, and has since deliberated, reviewed and reaffirmed that declaration. Revenue Act of 1951, P.L. 82-183,

65 Stat. 452. Clearly Congress intended to afford broad exemption and in fact enumerated only two exceptions to the exemption: real property tax and tangible personal property tax. Congress certainly could have communicated any intention or desire to also exclude other taxes, but did not.

The motive behind an attempt to water down the effect of a clearly worded and intentioned federal tax exemption by arguing that the wording or intentions of the City's ordinance are somehow more deliberate is suspect. The apparent preeminence of local revenue collection, albeit to fund local services, at the expense of impugning federal law and congressional intent is unfortunate. Perhaps most disturbing in this instance is that the party being attacked, the federal credit union, is an entity of the utmost importance to millions of Americans. Any erosion of the exemption would jeopardize the resilience, self-sufficiency and essential cooperative nature of credit unions, the most consumer-oriented of financial institutions.

Petitioner recognizes that in *United States v. New Mexico*, 455 U.S. 720 (1982), independent government contractors were found not to be immune from taxation by virtue of their provision of contractual research and other service to the federal government. The Court in *New Mexico* stated that the independent contractors could not be termed "constituent parts of the Federal Government." The Court specifically stated that this is "in contrast to federal employees." The Ninth Circuit court in this case also recognized "crucial" differences between employees and independent contractors.

Finding that an independent contractor is not immune as an instrumentality of the federal government does not lead to Petitioner's conclusion that the Ninth Circuit must believe federal employees to be federal instrumentalities in and of themselves. The critical issue in this instance is that the federal

credit union employees are standing in the shoes of the federal instrumentality. They need not be considered federal instrumentalities themselves to be immune, only to be acting on the federal instrumentalities' behalf.

In fact, in this case it can be no other way. At issue is occupancy of a hotel sleeping room. Petitioner would like to believe that the nature of the City ordinance, as it is drafted, makes it impossible for a federal instrumentality, that has no physical body with which to occupy a bed, to avoid the tax. To accept Petitioner's argument means the drafters have successfully fashioned a tax that can not be avoided, even when there is clear Congressional intent to provide such exemption. It is difficult to understand how the City might believe that Congress intended to leave such room for skillful drafters to avoid the clear meaning of the federal statute.

II.

THE NINTH CIRCUIT DECISION IS NOT IN CONFLICT WITH THE FOURTH CIRCUIT COURT.

At the crux of the Ninth Circuit decision is the fact that the occupants of the sleeping rooms were "constituent parts" of the federal instrumentality, the credit union.

The occupants in the Fourth Circuit case of *United States v. Montgomery County,* 761 F.2d 998 (4th Cir. 1985) cited by Petitioner were not employees, or even independent contractors of the organization in question. They were simply outpatient clients, in no way responsible for the organization carrying out its governmental duties or obligations. Clearly, they were not constituent parts of the organization.

One must certainly differentiate then, between a decision

concerning such individuals and federal credit union employees where the federal credit union relies on the physical presence of its constituent part employees to carry out its federal instrumentality role. Petitioner itself states that *Montgomery County* is the "only decision on point by another circuit." Since that decision is in fact not on point at all, there exists no conflict justifying Petitioner's request.

III.

THE NINTH CIRCUIT DECISION ANSWERS CLEARLY THE QUESTIONS RAISED IN REGARD TO THE EXEMPTION.

Petitioner is correct that the questions raised in this case are important. But Petitioner fails to recognize that the questions raised have been answered.

The Ninth Circuit decision is clear in stating that federal credit union employees are constituent parts of their federal instrumentality credit union employer while attending to credit union business. The decision is also clear that the employees are then immune from the transient occupancy tax by virtue of Section 1768 of the Federal Credit Union Act. The decision exhausts the questions raised by this case and the raising of auxiliary issues does not support a petition for certiorari.

CONCLUSION

Because the Ninth Circuit decision correctly applies 12 U.S.C. § 1768 and recognizes the intention of Congress that federal instrumentality employees, with respect to their professional duties, are entitled to tax-exempt status, and because the decision is not in conflict with the Fourth Circuit Court and because the decision clearly answers the questions raised in

regard to the exemption, the Petition for Writ of Certiorari should be denied.

Dated: January 9, 1997

Respectfully submitted,

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